STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

MONTICELLO ESTATES HOMEOWNERS ASSOCIATION,

Plaintiff,

vs. Case No. 2004-3841-CK

TIMOTHY SIVEC and CATHY BENTSON,

Defendants.
_____/

OPINION AND ORDER

This matter is before the Court for a judgment on the stipulated facts.

Plaintiff filed this complaint on September 14, 2004. Plaintiff alleges that defendants erected a second building on their lot in violation of the subdivision's restrictive covenants. Plaintiff thus brought Count I, for violation of the restrictive covenants, Count II, for nuisance per se, and Count III, for enforcement of the covenant's penalty provision. Plaintiff requests that this Court issue declaratory judgments holding that defendants' second building is a violation of the restrictive covenants and that it constitutes a nuisance per se. Plaintiff also requests that this Court order defendants to remove the offending building immediately and issue a permanent injunction restraining defendants from engaging in further violations of the restrictive covenants. Finally, plaintiff requests that this Court award plaintiff actual costs incurred in prosecuting this litigation and $500.00 for fragrantly violating the restrictive covenants.

On March 29, 2006, the parties presented the Court with stipulated findings of fact. According to the stipulated findings of fact, defendants own a home located at 33036 Monticello Drive, Monticello Estates Subdivision, in the City of Sterling Heights. Restrictive covenants

govern all property located within Monticello Estates Subdivision. In pertinent part, these restrictions provide that "[n]o building shall be erected, altered, placed upon or be permitted to remain on any of the lots other than one (1) detached single-family dwelling . . ." Stipulated Facts, Exhibit A, ¶ 5. The restrictive covenants do not define the terms "building" or "structure." The parties have provided a photograph of the structure erected by defendants. The parties have also attached photographs of several other structures which the parties acknowledge are located within Monticello Estates Subdivision. These other photographs show a children's playhouse, two "portable type sheds," and a gazebo.

When a matter is submitted to the court on undisputed facts, it is appropriately reviewed as a judgment on stipulated facts pursuant to MCR 2.116(A). Appellate courts review such judgments only for errors of law. *Federal Land Bank of St Paul v Bay Park Place, Inc*, 162 Mich App 1, 6; 142 NW2d 222 (1987).

In support of its position, plaintiff argues that the law recognizes a strong public policy favoring enforcement of restrictive covenants. Plaintiff points out that defendants agree that the Bylaws and Covenants of Monticello Estates Subdivision apply to their house. Plaintiff argues that the clear and unambiguous meaning of the term "buildings" shows that the structure erected by defendants violates the aforementioned covenants. Finally, plaintiff argues that the restrictive covenants authorize an award of attorney fees in this matter.

In response, defendants essentially claim that, looking at the deed restrictions as a whole, it is not clear that the structure they have erected is a "building" within the meaning of the restrictive covenants. Specifically, defendants claim that the covenants contemplate the erection of outbuildings on lots, since they expressly prohibit using outbuildings and other structures as residences. Defendants further argue that the structure they erected cannot be deemed an

"obvious" violation of the restrictive covenants in light of the structures that plaintiff does not believe to be "buildings."

Strong public policy supports the right of property owners to create and enforce covenants affecting their property. *Terrien v Zwit*, 467 Mich 56, 70-71; 648 NW2d 602 (2002). Courts must normally enforce unwaived restrictions on which the owners of other property covered by the covenants have relied. *Id.* at 72. Nevertheless, negative covenants must "be strictly construed against the would-be enforcer, . . . and doubts resolved in favor of the free use of property." *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). Therefore, courts will not grant equitable relief unless there has been an obvious violation of the covenants. *Stuart, supra* at 210.

Defendants have not specifically raised the issue of waiver in their brief, but given the presumption that unwaived restrictions must be enforced, *Terrien, supra* at 72, the Court shall address this issue sua sponte. Restrictive covenants are waived only when the character of a subdivision has been altered to the extent that the original purpose of the restriction has been defeated. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 346; 591 NW2d 216 (1999) (citation omitted). Waiver will not be found "where the character of the neighborhood intended and fixed by the restrictions remains unchanged." *Rofe v Robinson*, 126 Mich App 151, 155; 336 NW2d 778 (1983).

In the case at bar, the photographs that the parties have attached to their stipulated findings of fact represent other structures which the parties acknowledge are located within the subdivision. The Court agrees with defendants' contention that several of these structures are technically "buildings" for purposes of the restrictive covenants.[1] By failing to recognize that

[1] See infra, *Ali v Detroit* , 218 Mich App 581, 584; 554 NW2d 384 (1996), and accompanying text.

these structures fit within its own definition of "buildings" and take action against the owners of the offending structures, plaintiff has not enforced the restrictive covenants with absolute uniformity. However, although plaintiff has not been entirely consistent in its enforcement, defendants have not demonstrated a change in the character of the subdivision such that the purpose of the restrictions has been defeated. To the contrary, while the photographs presented by the parties suggest that the restrictions have not been rigorously adhered to in all cases, it appears that the character of the subdivision as intended and fixed by the restrictions remains essentially unchanged. Therefore, the Court is satisfied that the restrictions on defendants' property have not been waived.

Having determined that the restrictive covenants have not been waived in this case, the Court shall now address whether the structure located on defendants' lot is an "obvious" breach of the restrictive covenants. First, the Court does not believe that the restriction on using outbuildings as residences renders the prohibition on erecting more than one building per lot unenforceable. As noted above, the restrictive covenants provide that "[n]o building shall be erected, altered, placed upon, or be permitted to remain on any of the lots other than (1) detached single family dwelling, and all garages shall be attached . . ." Exhibit A, ¶ 5, *supra*. The restrictive covenants also prohibit utilizing any "structure of a temporary character, trailer, basement, tent, shack, garage, barn, or other outbuildings . . . as a residence, either temporarily or permanently." *Id.*, ¶ 9. When interpreting deed restrictions, the Court must consider all restrictions as a whole and harmonize all parts as far as reasonably possible. *Rofe*, *supra* at 157.

To the extent that these provisions of the restrictive covenants are inconsistent, the Court finds that such inconsistencies cannot be "harmonized" simply by abrogating the restriction on secondary buildings. Construing the restrictions as a whole, the prohibition on secondary

buildings would be rendered meaningless if permanent outbuildings could be constructed on lots covered by the restrictions. While the passing reference to "outbuildings" is incongruous given the prohibition of such buildings, the Court believes that the most reasonable interpretation of these conflicting provisions is to construe the prohibition against using outbuildings as residences to be a general prohibition of any residential uses within the subdivision apart from single-family homes.

The Court is also satisfied that defendants' structure is an obvious violation of the restrictive covenants based on the meaning of the term "building." The parties acknowledge that the term "building" is not defined in the restrictive covenants. However, the absence of an explicit internal definition of a term does not necessarily render the term ambiguous; rather, the term is interpreted in accordance with its "commonly used meaning." *Terrien*, *supra* at 76 (citations omitted). "Building" has been defined as a "relatively permanent, essentially boxlike construction having a roof and used for any of a wide variety of activities, as living, entertaining, or manufacturing," and as a "structure designed for habitation, shelter, storage, trade, manufacturing, religion, business, education and the like. A structure or edifice enclosing a space within its walls, and usually, but not necessarily[,] covered with a roof." *Ali v Detroit*, 218 Mich App 581, 584; 554 NW2d 384 (1996), quoting *The Random House College Dictionary: Revised Edition* (1984) and Black's Law Dictionary (5th ed). Plaintiff offers its own definition of building as well, defining the term as "any structure, temporary or permanent, having one or more floors and a roof intended for the shelter and enclosure of persons, animals or property."

The gazebo represented in Exhibit F of the Stipulated Facts is clearly not a "building" pursuant to these definitions. However, the four other structures represented in Exhibits C through F of the Stipulated Facts, which plaintiff does not consider "buildings," strictly satisfy

the definitions of "building" provided above. Nevertheless, the fact that there may be other "obvious" violations of a restrictive covenant within defendants' subdivision does not render defendants' violation of the restrictive covenants any less obvious. Therefore, the Court is satisfied that defendants' structure is an obvious violation of the restrictive covenants and must be removed.

The Court now turns to plaintiff's request for attorney fees. Attorney fees are generally not recoverable unless recovery is expressly authorized by contract, statute, court rule or a recognized exception to the general rule. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998) (citations omitted). Exceptions to the general rule must be narrowly construed. See, e.g., *Brooks v Rose*, 191 Mich App 565, 575; 478 NW2d 731 (1991) (citation omitted).

In support of its request for attorney fees, plaintiff cites MCL 559.206(b), which provides that "the association of co-owners or the co-owner, if successful" in a lawsuit against a defaulting co-owner, "shall recover the costs of the proceeding and reasonable attorney fees, as determined by the court, to the extent the condominium documents expressly so provide." By its terms, this statute applies to condominiums. See MCL 559.206.

For the first time in its brief, plaintiff states that Monticello Estates Subdivision is a condominium development. None of the documents previously presented to this Court during the course of this litigation support this allegation. Therefore, it is unclear whether MCL 559.206(b) is applicable to the case at bar. However, even if MCL 559.206 is controlling, an award of attorney fees is not warranted in this matter since the restrictive covenants do not expressly provide for such an award.

The penalty provision in the restrictive covenants provides that plaintiff Homeowners Association has "the right, whenever there shall have been built on any lot in the subdivision, any structure which is in violation of the restrictions, to enter upon the property where such violation exists and summarily abate or remove the same at the expense of the owner of said lot and charge a fine in the amount of $500.00 *in addition to the expense to correct said violation*." Exhibit A, ¶ 27, *supra* (emphasis added).

Taken in context, the Court finds that this penalty provision entitles plaintiff to recover costs incurred in *physically* abating or removing a structure which violates the restrictive covenants. This provision does not entitle plaintiff to attorney fees. The Court notes that a separate clause in this paragraph refers to the right of the Association to "proceed at law or in equity to complete a compliance with the terms hereof, or to prevent any violation or breach of any of" the restrictive covenants. *Id.* This clause, however, makes no mention of a "right" to recover attorney fees. In fact, attorney fees are not expressly mentioned anywhere in the paragraph at issue.

The clause containing the reference to "the expense to correct said violation" is set off from the clause concerning proceedings at law or equity by the phrase "[i]n addition to the foregoing right." *Id.* This indicates that the remedy provided for in this clause—entry onto property, removal of offending structures, and recovery of associated costs—is separate and distinct from remedies "at law or in equity." Further, immediately following the clause authorizing the award of "the expense to correct said violation," the restriction goes on to provide that "[s]uch entry and abatement or removal shall not be deemed a trespass." *Id.* Therefore, the Court is satisfied that the award of expenses to correct violations is limited to the

expenses of physically abating or removing offending structures. As such, plaintiff's request for attorney fees must be denied.

In their brief, defendants' state that "assuming *arguendo* this Court finds Defendants' Playhouse violates the Restrictive Covenants, Plaintiff is only entitled to $500.00 as a fine." Defendant's Brief at 8. Since the Court has found that defendants' playhouse is a violation, and since the parties do not dispute the award of $500.00 to plaintiff in these circumstances, the Court is satisfied that the award of $500.00 is warranted.

Finally, the Court notes that, among the various forms of relief plaintiff is seeking in this matter, plaintiff requests a declaratory judgment decreeing that defendant's playhouse is a nuisance per se. However, plaintiff has provided no legal authority in support of this request. A party may not merely announce his position and leave it to the court to discover and rationalize the basis for his claims, *Wilson v Taylor,* 457 Mich 232, 243; 577 NW2d 100 (1998), nor may he give issues cursory treatment with little or no citation of supporting authority. *Houghton v Keller,* 256 Mich App 336, 339; 662 NW2d 854 (2003). Therefore, the Court declines to issue a declaratory judgment concerning nuisance per se.

For the reasons set forth above, the Court DECLARES that defendants' second building "playhouse" is a violation of the applicable restrictive covenants, the Court ORDERS defendants to remove the building from their property, and the Court ENJOINS them from further violations of the restrictive covenants. Defendant is also ORDERED to pay plaintiff a fine of $500.00. Plaintiff's request that this Court declare the playhouse a nuisance per se is DENIED, and plaintiff's request for attorney fees is also DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order resolves the last pending claim and closes this case.

IT IS SO ORDERED.

EDWARD A. SERVITTO, JR., Circuit Court Judge

Date:

EDWARD A. SERVITTO
CIRCUIT JUDGE

cc: Michael Chupa, Attorney for Plaintiff

T. Allen Francis, Attorney for Defendants

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